No. 75-1651

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM L. MATHESON, EXECUTOR OF THE WILL OF DOROTHY GOULD BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. B 25a-35a) is reported at 400 F. Supp. 1241. The opinion of the court of appeals (Pet. App. A 1a-24a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1976. The petition for a writ of certiorari was filed on May 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a native-born American's marriage to a Mexican national and subsequent application in 1944 for a

certificate evidencing her Mexican nationality resulted in her automatic expatriation under Section 401 of the Nationality Act of 1940, so as to enable her to avoid imposition of federal income, estate and gift taxes.

2. If the native-born American's 1944 application for Mexican nationality resulted in expatriation, whether her subsequent invocation of American citizenship during the remaining 25 years of her life bars her executor from now asserting her expatriation to avoid federal taxes.

STATUTE INVOLVED

The pertinent provisions of Section 401 of the Nationality Act of 1940, 54 Stat. 1168, are as follows:

> SEC. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person * * *; or
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; * * *

STATEMENT

Petitioner is the executor of the estate of Dorothy Gould Burns, who was born in 1904 of American parents in the United States. In 1919, decedent left the United States for Europe, and she never re-established residence here. In 1925 she married Baron Roland Graffenreid de Villars, a Swiss citizen. There were two daughters born of that marriage, which ended in divorce in 1936. Following the German occupation of France, decedent returned briefly to the United States in 1941. Shortly thereafter, she travelled to Cuba where she met her second husband, Archibald Burns, a Mexican national of Scottish descent. She followed Burns to Mexico where they were married in 1944 (Pet. App. A 3a).

Under Mexican law, an alien woman who married a Mexican citizen became a Mexican citizen by naturalization. Consequently, decedent sought and received a certificate evidencing her Mexican nationality from the Mexican Ministry of Foreign Relations (Pet. App. A 3a-4a). It was advantageous for decedent to secure this certificate for two reasons. First, it facilitated the immigration into Mexico of her daughter, Rolande. Secondly, it allowed decedent to obtain a Mexican passport, which was required for a Mexican citizen to leave or enter that country (Pet. App. B 31a). The application for the certificate which decedent signed in 1944 contained the following declaration (Pet. App. A 4a):

> I herewith formally declare my allegiance, obedience, and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin.

Thereafter, in 1947, decedent applied for and received a United States passport. At that time, she executed an "Affidavit by Native American to Explain Protracted Foreign Residence" in which she swore that she had "never taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state." Decedent made similar sworn statements in 14 other affidavits and passport applications filed with the United States authorities until a year before her death in 1969 (Pet. App. A 5a).

During 1952 to 1953, the State Department delayed issuance of an extension of decedent's passport in order to investigate the circumstances surrounding her receipt of Mexican nationality. Petitioner William L. Matheson represented decedent before the State Department in those proceedings, which culminated in a determination that she enjoyed dual citizenship and therefore qualified for a United States passport. On March 24, 1953, petitioner wrote to decedent advising her of this determination, pointing out its advantageous aspects, and cautioning her to take no action which might jeopardize her United States citizenship, awaiting such time as the balance of her interests might swing in favor of expatriation (Pet. App. A 5a-6a).

From 1944 until her death in 1969, decedent evidenced and took advantage of her United States citizenship in a variety of other ways. During that period, she filed 21 separate federal tax returns, which had been prepared by petitioner, in which she swore that she was a United States citizen. She made similar declarations of United States citizenship to the taxing authorities in France,[1] on the strength of which certain of her United States source income (consisting largely of interest on municipal securities exempt from United States income taxation) was determined to be exempt from French taxation. Finally, in 1958, decedent invoked her American citizenship in order to apply to the United States Coast Guard for American registration of her private yacht, which permitted its duty-free entry into France (Pet. App. A 6a).

This case consists of two consolidated actions involving federal taxes respectively instituted by the United States and petitioner against each other in the United

[1]Decedent travelled to France in 1953 and established residence in that country in 1956 (Pet. App. B 27a).

States District Court for the Southern District of New York. The United States sought to recover from petitioner $6,948.97 of income taxes and interest for the year 1966 alleged to have been erroneously refunded to decedent's estate. Petitioner sought to recover from the United States $9,954.17 in gift taxes and interest for the years 1966 through 1968 (Pet. App. A 6a-7a). In each case, the determination of liability turned on whether decedent was a United States citizen.[2]

Both the district court and the court of appeals rejected petitioner's argument that decedent's 1944 application for a certificate of nationality resulted in her expatriation and held that decedent was subject to United States tax. In the lower courts' view, decedent did not have the requisite intent to expatriate herself under *Afroyim* v. *Rusk*, 387 U.S. 253, and the statements made in her application for a certificate of Mexican nationality were merely descriptive of her status as a dual national (Pet. App. A 12a-16a; Pet. App. B 30a-33a).

The lower courts also held that even if decedent's conduct in 1944 resulted in her expatriation, her subsequent actions denying that she had ever taken an oath of allegiance to a foreign power, and taking advantage of her asserted United States citizenship, estopped her executor from now claiming that she was not a United States citizen (Pet. App. A 19a-22a; Pet. App. B 33a-34a). Finally, the court of appeals held that, in any

[2]The determination in this case of Mrs. Burns' citizenship will control the outcome of a related Tax Court proceeding involving her estate's liability for federal estate taxes in an amount exceeding $3,000,000. *Estate of Dorothy Gould Burns, deceased, William L. Matheson, Executor* v. *Commissioner*, Dkt. No. 8756-73. The proceedings in that case have been stayed pending the final decision in this case.

event, petitioner was barred by laches from raising a claim of expatriation that is now more than 30 years old, especially in light of the fact that the critical witness, the decedent, was no longer available to testify (Pet. App. A 23a-24a).

ARGUMENT

1. Section 401(a) and (b) of the Nationality Act of 1940, *supra*, p. 2, provides that "[a] person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by" "[o]btaining naturalization in a foreign state * * * upon his own application * * *" or "[t]aking an oath or making an affirmation or other formal declaration of allegiance to a foreign state."[3]

Petitioner argues that decedent's 1944 application for a certificate evidencing her Mexican nationality automatically expatriated her under the statute. But in *Afroyim* v. *Rusk*, 387 U.S. 253, this Court rejected an analogous contention in a case involving Section 401(e) of the Nationality Act, which then provided that a United States citizen would lose his citizenship by voting in a foreign political election. Afroyim was a naturalized American citizen who had voted in such an election, but in so doing, had no intention of renouncing voluntarily his United States citizenship (387 U.S. at 254-255). After observing that United States citizenship was conferred by the Fourteenth Amendment upon persons born or naturalized in the United States, the Court held that Section 401(e) was unconstitutional because Congress had no general power to take away an American citizen's citizenship without his assent. As the Court stated, "the Amendment can most

[3]Substantially identical provisions of current law are found in the Immigration and Nationality Act of 1952, 66 Stat. 267, Section 349(a)(1) and (2) (8 U.S.C. 1481(a)(1) and (2)).

reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it" (387 U.S. at 262).

Here, there is nothing in the record that would support a finding that decedent's application for a certificate of Mexican nationality was prompted by a specific intent to relinquish her American citizenship. Indeed, decedent had already become a Mexican citizen by operation of Mexican law upon her marriage to Archibald Burns. Thus, the court of appeals held that the evidence "not only fails to show that [decedent] intended expatriation but, on the contrary, overwhelmingly supports the inference that she sought and obtained dual nationality" (Pet. App. A 19a). Under these circumstances, the appellate court correctly decided that *Afroyim* governs this case and requires the conclusion that decedent was not expatriated by her application for a certificate of Mexican nationality.[4] At all events, even apart from *Afroyim*, decedent's application for a certificate evidencing her Mexican nationality was not expatriating conduct under the Act because of her status as a dual national. See *Jalbuena* v. *Dulles*, 254 F. 2d 379 (C.A. 3); *Kawakita* v. *United States*, 343 U.S. 717, 723-724.

Although petitioner attempts (Pet. 10) to distinguish *Afroyim* on the ground that it involved voting in a foreign political election, the rationale of the Court's

[4]Contrary to petitioner's argument (Pet. 10), *Afroyim* was not overruled by *Rogers* v. *Bellei*, 401 U.S. 815. That case involved a statutory grant of citizenship to persons born abroad of United States parents. The Court held that Congress could constitutionally impose reasonable conditions subsequent of residency which, if unfulfilled, would result in loss of that citizenship. In so holding, however, the Court distinguished *Afroyim* and emphasized (401 U.S. at 835) that its decision did not apply to the constitutional citizenship involved in that case.

decision cannot be confined to Section 401(e) of the Act. *Afroyim* broadly held that Congress has no power to prescribe any objective conduct that will automatically result in expatriation, absent the individual's voluntary relinquishment of citizenship (387 U.S. at 268). It is therefore equally applicable to this case involving the application by an American citizen for a certificate evidencing foreign nationality.

Indeed, in accord with the decision below, the lower courts have applied the *Afroyim* rationale to a variety of expatriating provisions of the statute. See, *e.g., Jolley* v. *Immigration and Naturalization Service*, 441 F.2d 1245 (C.A. 5) (failure to report for military induction not automatically expatriating); *Baker* v. *Rusk*, 296 F. Supp. 1244 (C.D. Cal.) (oath of allegiance to foreign power not automatically expatriating); *In re Balsamo*, 306 F. Supp. 1028 (N.D. Ill.) (return to country of origin not automatically expatriating); *Peter* v. *Secretary of State*, 347 F. Supp. 1035 (D. D.C.) (employment for foreign government not automatically expatriating).[5] The Attorney General has likewise expressed the opinion that *Afroyim* applies to all sections of the Nationality Act of 1940 involving expatriation. 42 Op. Att'y Gen., No. 34, pp. 4, 5 (1969). Thus, contrary to petitioner's assertion (Pet. 12), there is no uncertainty concerning the applicability of *Afroyim* that would require review by this Court.

Finally, *Savorgnan* v. *United States*, 338 U.S. 491 (Pet. 9), does not support petitioner's expatriation claim. There, the individual had executed a specific renunciation

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[5]Even prior to *Afroyim*, this Court had invalidated other involuntary expatriation provisions. See *Trop* v. *Dulles*, 356 U.S. 86; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144; *Schneider* v. *Rusk*, 377 U.S. 163; *Nishikawa* v. *Dulles*, 356 U.S. 129.

of her United States citizenship as a condition to her naturalization as an Italian citizen, and that renunciation was knowing and voluntary (338 U.S. at 494-495, 502). On those facts, the Court held that she could not avoid the consequences of her act by showing her "undisclosed intent" not to lose her United States citizenship (*id.* at 500). *Savorgnan* is therefore entirely consistent with the holding of *Afroyim*, that Congress could not deprive an individual of his citizenship "without his assent" (387 U.S. at 257). In *Savorgnan*, that assent was conclusively established by the individual's explicit, knowing, and voluntary renunciation of her United States citizenship.

2. Even if decedent's application for a certificate of Mexican nationality was expatriating, the court of appeals correctly held that petitioner was estopped from making such a claim because decedent had repeatedly represented to the United States government that she was an American citizen and that she had never taken an oath of allegiance to any foreign state and had thereby secured substantial benefits from this government, such as a United States passport, United States registry of her vessel with certain collateral financial benefits, and French tax benefits premised upon her American nationality. *Rexach* v. *United States*, 390 F.2d 631 (C.A. 1), certiorari denied, 393 U.S. 833. See also *Commissioner* v. *National Lead Co.*, 230 F.2d 161, 165 (C.A. 2), affirmed on another issue, 352 U.S. 313.

Petitioner argues (Pet. 13, 15) that the expatriation claim is not barred because decedent's earlier conduct was based upon an innocent mistake of law and because the government did not rely on her conduct to its detriment. But decedent's representations included the specific declaration that she had not taken an oath of

allegiance to any foreign state (Pet. App. A 5a). Her conduct was therefore not prompted by an innocent mistake of law. Moreover, the United States extended to decedent numerous benefits that were only accorded citizens on the strength of these representations. Petitioner should not now be able to claim after decedent's death, for the purpose of avoiding taxes, that she was not an American citizen.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]The court of appeals also correctly held that petitioner's claim of expatriation is barred by laches because it is based upon events which occurred over 30 years ago and decedent is now unavailable to explain her conduct (Pet. App. A 23a-24a). See *Simons* v. *United States*, 452 F.2d 1110, 1116-1117 (C.A. 2). The equitable considerations against allowing such a claim when decedent had ample prior opportunities to advance it over a 20-year period and chose not to do so are the essence of the bar of laches.

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